IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 241 of 1988

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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CHHANABHAI PRABHOO & 2 - Appellant(s)
Versus
ISHWARBHAI PURSHOTTAMBHAI - Defendant(s)

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Appearance :
MR RN SHAH for Appellant(s) : 1 - 3.
MR VM TRIVEDI for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 12/12/2006

ORAL JUDGMENT

1. Shri R.N. Shah, learned counsel for the appellants. None for the respondent.

2. The plaintiff Ishwarbhai Purshottambhai filed the suit against the present appellant claiming relief that the passage situate to the east of his house being land bearing survey no. 345 is of his exclusive ownership and the defendant does not have any right of passage or have no other right to pass from the said land. The defendants appeared in the suit and contested the same on various grounds. The learned trial court, after hearing the parties came to the conclusion that the defendant has right to pass from the land, but on an appeal, the learned District Judge, Surat allowed the appeal and held that the defendants have no right. Being aggrieved by the said judgment and decree passed by the learned appellate court, the appellants have filed this appeal which has been admitted for hearing the parties on the following substantial question of law.

> "In the facts and circumstances of the case it should not have been held that the defendants have right of passage over the

suit land and this being enjoyed by all the members of the joint family and heir right of passage is reserved in a document exh. 106 in 1934.”

3. The findings recorded by the learned first appellate court clearly show that partition was effected in the year 1955 and since thereafter the parties were living separately in the property. The said partition, in fact, decided the rights of the parties and the right of way, if any, is to be judged from the said partition. The learned first appellate court has also observed that there is no dispute that to the west of the defendant's property, there did exist passage which is in form of the public street and is available to the defendants. If that is the finding, then the question of easement in favour of the defendants-appellants would not arise and if the partition deed or the terms of the partition did not reserve any right in favour of the defendants to use the plaintiff's land, then the defendants had no

right to use the land.

4. The learned first appellate court was absolutely justified in decreeing the suit. I find no reason to interfere. The appeal deserves to and is accordingly dismissed. No costs. Interim relief, if any, is vacated.

5. Decree be framed accordingly.

[R.S. GARG, J.]

pirzada/-